Supreme Court, U.S.
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No. 04-514

IN THE

Supreme Court of the United States

RICKY BELL, WARDEN,
Petitioner,

v.

GREGORY THOMPSON,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT

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CAPITAL CASE
QUESTION PRESENTED

Does Rule 41(d)(2)(D) of the Federal Rules of Appellate Procedure require immediate issuance of a court of appeals' mandate following this Court's denial of a petition for a writ of certiorari, such that any delay in issuing the mandate is an abuse of discretion unless justified by the extraordinary circumstances warranting recall of the mandate from another court?

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Rosemary Krimbel, *Rehearing Sua Sponte in the Supreme Court: A Procedure for Judicial Policymaking*, 65 Chi.-Kent L. Rev. 919 (1989) 24
Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure*, (4th ed. 2001) 46
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STATUTES AND RULES

This case involves an interpretation of Rule 41 of the Federal Rules of Appellate Procedure, which is set forth in an appendix to this brief. App., *infra*, 1a.

STATEMENT OF THE CASE

This case concerns the power of a court of appeals to withhold issuance of its mandate following this Court's denial of a petition for a writ of certiorari. Petitioner's view is that, upon receipt of an order denying certiorari review, a court of appeals must immediately issue its mandate, such that any delay in issuing the mandate is akin to recalling a mandate from another court. That is mistaken. Nothing in Rule 41 of the Federal Rules of Appellate Procedure, this Court's decision in *Calderon v. Thompson*, 523 U.S. 538 (1998), or this Court's analogous decisions concerning "finality" abrogates the power of a court of appeals to withhold issuance of its mandate following the denial of certiorari for reasons unrelated to this Court's decision to deny review. To the contrary, each of these sources reaffirms the centuries-old proposition that a court of appeals has wide discretion to modify or vacate its prior decisions until deciding to relinquish jurisdiction over a case. Courts of appeals may (and sometimes do) exercise that discretion.

The court of appeals' decision in this case falls well within that discretion. Exercising its power to delay issuance of the mandate pending *sua sponte* rehearing, the court retained jurisdiction over the case until reaching a final decision it determined correctly resolved the issues presented. The court of appeals spent "hundreds of hours" reviewing the record before ultimately concluding that a key piece of evidence completely undercut its prior decision and precluded summary dismissal of Thompson's capital habeas petition. Far from an abuse of discretion, the decision below is a textbook and laudable basis for reconsideration.

1. On January 2, 1985, a few hours after being arrested, Gregory Thompson ("Thompson" or "Respondent") confessed to abducting and murdering Brenda Lane ("Lane") the day before. Pet. App. 120. After Thompson directed a search team to Lane's body the following day, a pathologist concluded that Lane died from multiple stab wounds to the back, but found no evidence of other trauma. *Id.* The State charged Thompson with capital first-degree murder.

Thompson's court-appointed trial counsel were aware of evidence suggesting Thompson was suffering from severe mental illness at the time of the crime. Prior to trial, counsel filed a notice that they would raise an insanity defense and also filed a motion seeking psychological and neurological evaluations to determine Thompson's competency. Following testing by the State, trial counsel requested court funds for an independent psychiatric evaluation and, on July 29, 1985, the trial court granted that request. Pet. App. 122-23; *cf. Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (due process requires state in capital cases to offer funding for psychiatric evaluation where defendant's sanity is at issue; "in such cases[ ] a defense may be devastated by the absence of a psychiatric examination and testimony").

Despite having requested and received court funds, trial counsel failed to retain an expert qualified to render a professional opinion about Thompson's mental health at the time of the crime. Pet. App. 128, 181. Trial counsel later explained that the psychiatrist they "ordinarily" used had moved out of the state. *Id.* at 181. Instead, trial counsel used the court-provided funds to pay for the services of Dr. George Copple, an "industrial psychologist" with a prior expertise in evaluating social security applicants' vocational abilities, and whom trial counsel had engaged, for the separate purpose of assessing "what kinds of things [Thompson] might be capable of doing in a prison situation," Pet. App. 123 n.4, *prior* to requesting funds for the psychiatric examination they argued was "need[ed]" to determine Thompson's

mental health. *Id.* at 122-123, 181-188. *Cf. Wiggins v. Smith*, 539 U.S. 510, 525 (2003) (finding investigation unreasonable "in light of what counsel actually discovered").

At trial, trial counsel conceded guilt, called no witnesses, and presented no proof. *Id.* at 123. On August 17, 1985, the jury found Thompson guilty of first-degree murder.

At sentencing, having failed to investigate the subject, trial counsel abandoned any affirmative effort to show that Thompson's mental state was a mitigating factor against imposition of the death penalty. Instead, trial counsel argued that, despite the gravity of the offense, Thompson had been a "non-violent, cooperative, and responsible" person who had the potential to be a productive prisoner.[1] To that end, Dr. Copple testified about Thompson's capacity for employment in prison. *Id.* at 123, 187-189. On September 4, 1985, after hearing no rebuttal to the State expert's conclusion that Thompson was not mentally ill at the time of the crime,[2] the jury imposed the death penalty, and the trial court sentenced Thompson to death. *Id.* at 127-30.

On February 27, 1989, the Tennessee Supreme Court affirmed the judgment and, on June 28, 1990, this Court denied certiorari. 497 U.S. 1031 (1990).

Thompson next sought state post-conviction relief, contending, *inter alia*, that trial counsel failed to "investigate adequately" his background and mental health condition. Pet. App. 13. The trial court denied Thompson's request,

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[1] Despite their uninformed and unreasonable decision, trial counsel nevertheless elicited testimony about Thompson's bizarre and "paranoid" behavior. Pet. App. 124, 263. That behavior, trial counsel were aware, surfaced following an incident during Thompson's military service in which he was attacked by three fellow service members with a crow bar, suffering a severe head injury. *Id.* at 124.

[2] Indeed, despite having failed to conduct the tests necessary to reach any opinion about Thompson's mental health, Copple conceded during cross-examination that it was his opinion that Thompson was *not* suffering from mental illness at that time. Pet. App. 127.

filed by his new counsel, for funds to conduct a full psychiatric and neurological examination and, after a hearing, denied Thompson relief. Pet. App. 138. On May 30, 1997, the Tennessee Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief. On October 20, 1997, the Tennessee Supreme Court denied Thompson's application for permission to appeal. *Id.* at 142.

2. On January 29, 1998, Federal Defender Service of Eastern Tennessee, Inc. ("habeas counsel") was appointed to represent Thompson in federal habeas proceedings. Pet. App. 16-17. On June 12, 1998, Thompson filed his federal petition in the United States District Court for the Eastern District of Tennessee, asserting, *inter alia*, ineffective assistance of counsel claims. The petition alleged that trial counsel failed to reasonably investigate Thompson's mental health, uncover and present readily available evidence of mental illness, and also failed, despite receiving court funds, to retain an expert qualified to diagnose his mental health at the time of the crime. *Id.* at 17-18, 143 n.12.

On February 17, 2000, acting on petitioner's motion, the district court summarily dismissed Thompson's claims on the grounds that he had not "provided this Court with *any* significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence." Pet. App. 270 (emphasis added). The district court stayed the execution "pending any appeal." J.A. 89.

3. On April 21, 2000, Thompson appealed the district court's summary dismissal order to the United States Court of Appeals for the Sixth Circuit.

a. On March 2, 2001, while the case was being briefed before the court of appeals, Thompson filed a motion in the district court for relief from the judgment, and urged the court to enter an order supplementing the record with the expert report and the State's deposition of Dr. Faye E. Sultan,

Ph.D. Pet. App. 337. Thompson argued that the grounds for the district court's summary dismissal – that Thompson had failed to produce any significant evidence of mental illness at the time of trial – was contrary to the report and deposition testimony of Dr. Sultan, a clinical psychologist retained by habeas counsel who had worked on approximately 75 capital cases. Pet. App. 338. Following formal psychological testing on Thompson, as well as clinical interviews of Thompson, his family, and friends, Dr. Sultan concluded that "Mr. Gregory Thompson has experienced symptoms of major mental illness throughout his adult life," and that "Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced." *Id.* at 19-20. Dr. Sultan concluded that Thompson was suffering from Schizoaffective Disorder, Bipolar Type at the time of the offense – rendering Thompson "unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur – lots of different kinds of delusions actually – auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination." *Id.* at 20, 76-77. Thompson's mental illness was severe at the time of the offense, and it has deteriorated even more during his incarceration. *Id.* at 20, 37-63.

The State was aware of Dr. Sultan's conclusions, having deposed her and having received a copy of her report. Habeas counsel had also identified Dr. Sultan as an expert witness in Thompson's pretrial witness list, and stated that Dr. Sultan was expected to testify that "it is her expert opinion that [Thompson] suffers from schizophrenia and did so at the

time of the offense and at the time of trial," and that Thompson's "mental illness was severe." Pet. App. 28.[3]

Habeas counsel argued that Dr. Sultan's report and deposition testimony created a disputed question of fact precluding summary dismissal of the claim, but, due to "excusable neglect," were not included in the record.[4] Pet. App. 340. On March 7, 2001, the district court, without reaching the merits of Dr. Sultan's report and testimony, denied the motion for relief from the judgment as out of time. *Id.* at 344.

After filing the motion for relief from the judgment, but prior to its resolution, Thompson also filed in the court of appeals a motion to hold the appeal in abeyance pending resolution of the motion before the district court. Pet. App. 333. To demonstrate that the merits of the motion before the district court warranted an abeyance, habeas counsel attached to the abeyance motion a copy of Dr. Sultan's report and deposition. *Id.* at 334; J.A. 10-87. On March 21, 2001, after being informed by the State that the district court had resolved the underlying motion, the court of appeals denied Thompson's motion to hold the appeal in abeyance. Pet. App. 345. The court of appeals did not address the merits of the question of whether Dr. Sultan's report created a disputed fact precluding dismissal of the petition. *Id.*

b. On March 14, 2001, also while Thompson's appeal was pending before the court of appeals, the State petitioned the Chancery Court for the State of Tennessee for the appointment of a conservator for Thompson to provide consent for medical and psychiatric treatment, including the forcible administration of medication if necessary. BIO App. 25. In support of that petition, the State argued that Thompson was

[3] Dr. Sultan's inclusion on the initial witness list and anticipated testimony was further raised in Thompson's briefing before the court of appeals. *See* Final Reply Brief of Appellant, Gregory Thompson at 18.

[4] Habeas counsel mistakenly believed that the State had previously placed the report and deposition testimony in the record. Pet. App. 340.

suffering from a longstanding and severe mental illness, and that he was "in need of protection and assistance by reason of the illness." *Id.*; J.A. 57. On April 30, 2001, the Chancery Court granted the State's petition.

Thompson's habeas counsel made an appearance in Chancery Court, challenging the State's appointment of a conservator and seeking to obtain Thompson's medical records from the prison. The State challenged that appearance, arguing that "the Federal Defender is limited to appearances in Federal Court in the Eastern District unless there is a Federal Court order permitting the office to appear in state court on a certain matter." Mot. to Preclude Appearance at 6. Habeas counsel requested that the court of appeals issue an order authorizing them to represent Thompson in state proceedings, which the court of appeals granted. BIO App. 229.

4. On January 9, 2003, the court of appeals, in a 2-1 panel decision, affirmed the district court's summary dismissal of the petition, finding, like the district court (but contrary to Dr. Sultan's report), that Thompson "has never submitted to *any* court *any* proof that he suffered from severe mental illness at the time of the crime." Pet. App. 159 (emphasis added). Although the court briefly noted Dr. Sultan's involvement in the case, *see id.* at 156, it did not address the merits of her conclusions.[5] Judge Moore noted in concurring that, "[w]hile I have sympathy for the view expounded in the dissent regarding the general propriety of using industrial psychologists as expert witnesses in capital cases, I cannot conclude that Thompson's trial counsel was constitutionally

[5] As noted above, the State was aware of Dr. Sultan's report and testimony. In its Reply Brief, however, the State argued that "[w]ith regard to [Thompson's] claim of ineffective assistance of counsel, despite the benefit of discovery in federal habeas proceedings and federal funding for mental health experts, Thompson presented no proof of his mental state at the time of the offense or at trial to support his contention that trial counsel was ineffective in failing to present proof regarding his mental state." Final Brief of Respondent-Appellee at 40.

ineffective in hiring Dr. Copple in this case because Thompson has presented no evidence that his counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime." *Id.* at 171.

Judge Clay dissented. He concluded that, under this Court's holding in *Williams v. Taylor*, 529 U.S. 362 (2000), the State court's decision rejecting Thompson's ineffective assistance of counsel claims was an "unreasonable application" of *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 172. *See also* 28 U.S.C. § 2254. Judge Clay concluded that trial counsel's failure to conduct a reasonable investigation into Thompson's mental health background, and failure to hire a qualified clinical psychologist or psychiatrist, resulted in a failure "to present any legitimate mitigating evidence at the penalty phase of the trial." Pet. App. 178-79. As a result, Judge Clay found that "there can be no confidence in the reliability of the state court's death sentence." *Id.* Finding that trial counsel's "baffling," "incomprehensible," and "completely indefensible" conduct "was not merely ineffectual, but positively detrimental" to Thompson's defense, Judge Clay would have vacated the district court's order and granted relief. *Id.* at 192, 200-01.

5. Thompson's timely filing of a petition for panel rehearing prevented issuance of the mandate. *See* Fed. R. App. P. 41(d)(1). In that petition, Thompson argued, *inter alia*, that Dr. Sultan's report and deposition testimony created a factual dispute concerning his mental health at the time of the offense which precluded summary dismissal of his petition. Pet. for Rehearing at 30. On March 10, 2003, the court of appeals denied the petition for rehearing. Pet. App. 346.

On March 13, 2003, Thompson timely moved to stay the mandate pending his petition for writ of certiorari and, on March 24, 2003, the court of appeals granted that motion. Pet. App. 347. On April 3, 2003, the court of appeals returned the case record to the district court. J.A. 7.

On August 19, 2003, while the stay of the mandate was in effect, more than seven months after the initial decision of the court of appeals and more than a year after it issued an order expanding habeas counsel's appointment to include state court proceedings, the State filed a motion requesting reconsideration of the appointment order. BIO App. 224.

On September 19, 2003, the court of appeals recalled the case record from the district court, which was recorded on the public docket sheet. J.A. 7-8.

On December 1, 2003, this Court denied Thompson's petition for a writ of certiorari. J.A. 91. The following day, Thompson moved the court of appeals to continue its stay of the mandate pending this Court's ruling on Thompson's petition for rehearing. Although a copy of this Court's "order denying the petition for a writ of certiorari," Fed. R. App. P. 41(d)(2)(D), was filed in the court of appeals on December 8, 2003, the State did not contest the authority of the court of appeals to continue the stay. On December 12, 2003, the court of appeals granted Thompson's stay request. Pet. App. 348. *See* Fed. R. App. P. 41(d)(1) (providing for stay of the mandate upon motion). On January 20, 2004, this Court denied Thompson's petition for rehearing. J.A. 92. On January 23, 2004, this Court's order denying rehearing was filed in the court of appeals. J.A. 8.

Although a federal court stay was in effect until the appeal was final, the State's motion for reconsideration of the court of appeals' appointment order – which was immediately relevant in subsequent state court proceedings – was still pending, the mandate had been stayed twice by court order, and the court of appeals had called for the record while the certiorari petition was pending, the State neither inquired about the mandate nor filed a motion for its issuance. Instead, on January 21, 2004, two days *before* this Court's order denying the petition for rehearing was filed in the court of appeals, the State filed a motion before the Tennessee Supreme Court requesting an execution date. BIO

App. 219. The State failed to mention that the court of appeals had not issued the mandate, representing that "Thompson has completed the standard three-tier appeals process, making the setting of an execution date appropriate." *Id.* at 220. On February 25, 2004, the Tennessee Supreme Court set Thompson's execution date for August 19, 2004.[6]

6. On June 23, 2004, the court of appeals issued a 3-0 panel decision vacating its prior decision to affirm the district court's order summarily dismissing respondent's habeas petition. Pet. App. 1-116. Invoking its "inherent power to reconsider [its] decision prior to the issuance of the mandate," Pet. App. 6, and having spent "hundreds of hours" engaging in *sua sponte* reconsideration of the case, the court of appeals concluded that it, like the district court, had erred in concluding that there was *no* factual dispute concerning whether Thompson suffered from a mental illness at the time of the offense. *Id.* at 8, 81. Specifically, the court concluded, the report and deposition testimony of Dr. Sultan, which it was now exercising its power to consider, created a factual dispute precluding summary dismissal of the petition. *Id.* at 2. The Court found Dr. Sultan's report, which concluded, *inter alia*, that Thompson's "mental illness would have substantially impaired [his] ability to conform his conduct to the requirements of the law" to be "so probative of Thompson's mental state at the time of the crime" that sum-

[6] The Tennessee Supreme Court also remanded the case to the state trial court for a determination of Thompson's competency to be executed. Pet. App. 350. Thompson thereafter submitted affidavits from three mental health professionals concluding that Thompson was incompetent to be executed. The trial court dismissed the case without a hearing, and the Tennessee Supreme Court affirmed. *Thompson v. Tenn.*, 134 S.W.3d 168 (Tenn. 2004). On June 14, 2004, Thompson filed in federal district court a motion for stay of execution and a petition for writ of habeas corpus raising a claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). On June 21, 2004, the district court entered a stay of execution pending a decision on the petition. That stay remains in effect.

mary dismissal was improper. Pet. App. 5, 63. The court of appeals also stayed the execution for 180 days. J.A. 8.

The State did not seek panel rehearing. Nor did the State seek *en banc* review. Instead, 113 days after the court of appeals' decision, the State filed a petition for a writ of certiorari before this Court. On January 7, 2005, this Court granted the petition limited to Question Two. J.A. 93. The Court denied certiorari of Question One, which sought review of the decision under 28 U.S.C. § 2244(b), and Question Three, which claimed that the court of appeals' decision to remand for an evidentiary hearing was inconsistent with *Williams v. Taylor*, 529 U.S. 420 (2000).

SUMMARY OF THE ARGUMENT

This case shows why a court of appeals has the authority and discretion to delay issuing its mandate following the denial of certiorari by this Court. Prior to this Court's resolution of the certiorari petition, the court of appeals called for the record, and then spent hundreds of hours reviewing the case before concluding that its prior decision was in error. The court concluded that a critical fact precluded summary dismissal of Thompson's federal habeas petition. After deciding to delay issuance of the mandate for reasons unrelated to this Court's denial of certiorari, the court of appeals had the authority to modify its discretion while retaining jurisdiction over the case. The court of appeals' decision to exercise that authority in this case was well within its discretion.

I. Petitioner asserts that Rule 41(d)(2)(D) of the Federal Rules of Appellate Procedure precludes a court of appeals from delaying issuance of its mandate for any reason following the denial of certiorari. It does nothing of the sort. Rather, it provides that, *if* the court of appeals has stayed issuance of the mandate for the reason that this Court may grant certiorari, then the clerk of a court of appeals must, upon receipt of the denial of certiorari, issue the mandate. It does not forbid a court of appeals from extending a stay pre-

viously entered for *other* reasons. Nor does it forbid a court of appeals for withholding issuance of the mandate for other reasons. To the contrary, Rules 41(b) and (d)(1) grant a court of appeals the discretion to stay and withhold issuance of its mandate. There are all kinds of reasons a court of appeals may on occasion delay issuing the mandate following the denial of certiorari. Those reasons are often wholly unrelated to (and unaffected by) this Court's decision to deny review. At the same time, the power to delay issuing their mandates is critical to permit courts of appeals to correct clear errors and preserve their reconsideration processes.

Petitioner's proposed interpretation is also contrary to the language and history of Rule 41(c). Under petitioner's view, a mandate is "effective" on the date the court of appeals receives the denial of certiorari, regardless of whether the mandate actually issued on that date. But Rule 41(c) flatly states that the mandate is effective *only* when it actually issues. The Advisory Committee specifically rejected efforts, like petitioner's, to make the mandate effective on the date it "should" have issued. In so doing, the Advisory Committee expressly noted that a court "may delay issuance of the mandate." That interpretation is entitled to weight.

Petitioner's reading of Rule 41(d)(2)(D), in any event, cannot come close to sustaining petitioner's burden of establishing that Rule 41 was intended to displace the centuries-old authority of courts to control their mandates. Long before the Founding, English courts of law and equity had considerable power to modify their decisions after issuing them. This Court adopted the "End of Term" Rule to account for the merger of law and equity. When Congress abolished that Rule in 1948, it left the courts with untrammeled power to determine when to relinquish jurisdiction over a case. Rule 41 does not displace that untrammeled power with a straightjacket following the denial of certiorari review.

II. Petitioner also contends that, because courts of appeal lack authority to delay issuing their mandates following

the denial of certiorari, *any* delay, for *any* reason, is akin to a decision recalling a mandate from another court. In support of that contention, petitioner relies upon this Court's decision in *Calderon*. But this Court in *Calderon* consistently identified issuance of a mandate denying habeas relief as the moment at which a habeas appeal becomes final, and *expressly* rejected the State's argument that the denial of certiorari review was instead that critical moment. Here, the court of appeals never issued the mandate and, accordingly, the original decision of the court of appeals never became effective. Petitioner's argument is little more than an attempt to relitigate *Calderon*. The related "contexts" petitioner identifies addressing "finality" simply cement the conclusion that a federal habeas appeal is not final until the court of appeals issues a mandate denying habeas relief.

III. Petitioner has no fallback position to his argument that *Calderon*'s "miscarriage of justice" standard applies in this case. If this Court determines that the *Calderon* standard does not apply, it should affirm the judgment. Indeed, even if this Court concludes that *Calderon* applies, it should remand the case to the court of appeals for a determination whether the exception for a stay pending reconsideration, or the exception for "fraud on the court," has been met in this case. This Court need not, and should not, reach those questions in the first instance.

ARGUMENT

I. A COURT OF APPEALS HAS DISCRETIONARY AUTHORITY TO WITHHOLD ISSUANCE OF THE MANDATE AFTER THIS COURT DENIES CERTIORARI.

Petitioner contends that a court of appeals has no authority or discretion to delay issuance of its mandate for any reason following this Court's denial of certiorari review. That limitation, petitioner says, is required by Rule 41(d)(2)(D). Petitioner is incorrect. Rule 41(d)(2)(D) is limited to cases

in which the mandate has been stayed for the reason that this Court may grant certiorari. It is not a categorical command. Courts of appeals may stay or withhold issuance of the mandate for *other* reasons, as other sections of Rule 41 make clear. Moreover, the Advisory Committee has expressly rejected petitioner's reading of the Rule. Finally, to the extent there is doubt, it should be resolved against petitioner. Courts of appeals have for centuries had considerable control over their mandates, and that control was untrammeled when Rule 41 was adopted. Petitioner's interpretation falls far short of demonstrating an affirmative intent to displace that power entirely following the denial of certiorari. The fact that petitioner reads Rule 41(d)(2)(D) as a *de facto* jurisdictional bar only makes that problem even more obvious.

A. Petitioner's Interpretation of Rule 41(d)(2)(D) is Contrary to the Text, Overall Structure, and History of Rule 41.

1. Petitioner's interpretation of Rule 41 relies exclusively upon Rule 41(d)(2)(D), which states that, if a mandate has been stayed pending a petition for certiorari, "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Fed. R. App. P. 41(d)(2)(D).[7] The Rule

[7] Although petitioner errs in asserting that, because issuance of the mandate is a "ministerial" act performed by the clerk, it is an unimportant *event*, Rule 41(d)(2)(D) does instruct the clerk to perform a "ministerial" function. Issuing the mandate is the responsibility of "the clerk, not the judges." *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988); *id.* ("[T]he duty to issue the mandate is . . . a responsibility of the clerk."); *cf. Commissioner v. Estate of Bedford*, 325 U.S. 283, 286 (1945) (noting that a judgment "is an act of the court," "even though a clerk does all of the ministerial acts, as here, in conformity with his court's standing instructions") (internal quotations omitted). A clerk is capable of issuing the mandate absent judicial supervision. Unless otherwise ordered by the court of appeals, a mandate consists of "a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs." Fed. R. App. P. 41(a). Rule 41(d)(2)(D) thus instructs the clerk that, unless

is by its terms limited to cases in which the reason a court of appeals has stayed issuance of the mandate is to await resolution of a petition for certiorari by this Court. By contrast, there is nothing in Rule 41(d)(2)(D) addressing cases in which the court of appeals has either stayed or withheld issuance of the mandate for reasons unrelated to this Court's resolution of a petition for certiorari. *See, e.g., First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 898 (5th Cir. 1995) (court of appeals may delay issuance of the mandate following denial of certiorari); *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (same). Other sections of Rule 41 grant a court of appeals the authority to determine both the appropriate length of a stay entered pending panel or *en banc* rehearing and the appropriate time to issue its mandate.

In the first place, Rule 41(d)(1) separately sets forth a court of appeals' authority to stay issuance of its mandate pending panel or *en banc* review. *See* Fed. R. App. P. 41(d)(1). If a court of appeals decides to grant rehearing, or rehearing *en banc*, Rule 41(d)(1) permits the court to stay the mandate until resolving the matter, "unless the court orders otherwise." *Id.*[8] Thus, far from being foreclosed from resolving a petition for rehearing or rehearing *en banc* following the denial of certiorari review, a court of appeals is affirmatively empowered both to resolve that petition and to make the ultimate determination *when* any stay entered dis-

the court has ordered otherwise, he or she must issue the mandate upon the filing of an order denying certiorari by this Court. In particular, it instructs that the clerk need not, before issuing the mandate, await (1) this Court's resolution of a petition for rehearing, (2) an order of the court of appeals for issuance of the mandate, or (3) a motion by a party for issuance of the mandate.

[8] Petitioner's reading of Rule 41(d)(2)(D) would also require the meaning of Rule 41(d)(1) to vary depending upon whether a petition for a writ of certiorari were filed in a case. Under petitioner's view, a court of appeals would have broad discretion to issue stays pending rehearing under Rule 41(d)(1) – but that discretion would vanish once a litigant chose to file a certiorari petition.

solves. *See* Fed. R. App. P. 41, 1998 adv. com. note (noting that the amendment to Rule 41(d) "does not require a court of appeals to grant a stay of mandate that is coextensive with the period granted for filing a petition for a writ of certiorari," and that the "granting of a stay and the length of the stay *remain within the discretion of* the court of appeals") (emphasis added).

The Fifth Circuit came to precisely this conclusion in *First Gibraltar Bank*, where it directly confronted an argument that Rule 41(d)(2)(D) made issuance of the mandate required "as soon as the Supreme Court denied certiorari." 42 F.3d at 897. The court rejected that argument, holding that it had "stayed the mandate in this case for two independent reasons: first, to permit an en banc poll … and second, to allow the state to petition for certiorari …. [B]ecause our stay was in effect (for a reason independent of the petition for certiorari) prior to the receipt of the order, we retain *discretionary control* over our mandate." *Id.* at 898 (emphasis added); *Alphin*, 552 F.2d at 1035 (finding that Rule 41 did not require issuance of mandate upon denial of certiorari when stay on independent grounds had been previously entered).

Even more fundamental is that Rule 41(d)(2)(D) does not remove a court of appeals' authority to determine when to *issue* the mandate. Although petitioner fails to mention it, the ultimate question in this case – when a court of appeals is required to issue a mandate – is actually set forth in Rule 41(b). And Rule 41(b) makes clear that the critical decision of when to issue the mandate is within the discretion of the court of appeals. Although it, like Rule 41(d)(2)(D), instructs a clerk when it "must" issue the mandate, Rule 41(b) also grants "[t]he court" the power to "shorten or extend the time." Fed. R. App. P. 41(b).

Accordingly, if, as here, a court of appeals decides under Rule 41(b) to withhold issuance of its mandate for reasons having nothing to do with the disposition of a petition for a

writ of certiorari before this Court, there is nothing in Rule 41(d)(2)(D) that strips the court of that power. *See, e.g., Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979) (holding that, despite mandatory language of Rule 41, "we do not think a failure to perform that duty punctually would deprive the court of jurisdiction" because "[t]he rule grants us power to shorten or enlarge the specified period by order"); *United States v. Black*, 733 F.2d 349, 351 (4th Cir. 1984) (finding that Fed. R. App. P. 41 did not limit inherent power to stay mandate).

There are all kinds of reasons why, apart from this Court's resolution of a certiorari petition, a court of appeals may sometimes choose to delay issuance of the mandate. New evidence may surface that requires reconsideration of the prior decision. *See, e.g., Hemstreet v. Greiner*, 378 F.3d 265, 269 (2d Cir. 2004) (reconsidering, *sua sponte*, and vacating prior affirmance of district court's judgment granting habeas petition, and remanding to the district court for consideration of new evidence). The court of appeals may discover a clerical error in its earlier decision that alters the opinion's meaning. The governing law may change, *requiring* the federal court to examine the case in light of the new law. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 236-37 (1944) (vacating decision of court of appeals for failing to consider a new state court opinion handed down after the time for rehearing expired but before the court of appeals issued its mandate); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) ("Until such time as the case is no longer *sub judice*, the duty rests upon federal courts to apply state law … in accordance with the then controlling decision of the highest state court."). A related question may come before the court of appeals or this Court, and the court may choose to hold the case pending resolution of that question. *See, e.g., United States v. Barela*, 571 F.2d 1108, 1111 (9th Cir. 1978) (Ferguson, J., dissenting) (observing that court stayed issuance of mandate while cases involving ret-

roactivity of prior Supreme Court decision were pending). The parties may initiate litigation collateral to the merits that the court concludes should be resolved at the same time as the underlying case. *See, e.g., Wolfel v. Bates*, 749 F.2d 7 (6th Cir. 1984) (concluding that a court of appeals may "delay" issuing a mandate "until the court determines whether to grant, deny, or remand to the district court the movant's request for attorney's fees"). Or the court may simply decide that it needs more time to reach the right result. *See, e.g., Muntaqim v. Coombe*, 396 F.3d 95, 95-96 (2d Cir. 2004).

Although reconsideration of a prior decision is typically resolved before this Court's resolution of a certiorari petition, that is not always the case. Courts of appeals sometimes exercise their authority to withhold issuance of their mandates, and reexamine a prior judgment *after* this Court has denied certiorari review. *See, e.g., Muntaqim*, 396 F.3d at 95-96 (rehearing case *en banc* after denial of petition for writ of certiorari); *Marathon Oil Co. v. A.G. Ruhrgas*, 129 F.3d 746 (5th Cir. 1997) (deciding *sua sponte* to rehear matter *en banc* after this Court's denial of petition for writ of certiorari); *Fairchild v. Norris*, 51 F.3d 129 (8th Cir. 1995) (rehearing and vacating prior decision after this Court denied certiorari because the mandate had not issued); *First Gibraltar Bank*, 42 F.3d at 896-98 (staying issuance of mandate, rehearing, and vacating prior decision after this Court denied certiorari due to change in controlling law); *Alphin*, 552 F.2d at 1034-1036 (staying issuance of mandate, rehearing, and reversing prior decision in part because of change in the relevant law). In none of these cases has a court of appeals held that its authority to withhold issuance of the mandate was eliminated by this Court's denial of certiorari review.[9]

[9] Six years prior to *Calderon*, and in contrast to the decisions of the Fourth, Fifth, and Sixth Circuits, the Ninth Circuit concluded that "[a]ny stay of mandate [after the denial of certiorari] would have to be justified upon the same grounds as would justify a recall of mandate." *Adamson v. Lewis*, 955 F.2d 614, 620-21 (9th Cir. 1992).

Indeed, this Court's decision to deny a petition for a writ of certiorari will often have little – if anything – to do with the court of appeals' decision to reconsider the matter. Petitioner fails to identify any reason – other than his reading of Rule 41 – why this Court's decision to deny certiorari review curtails the power of a court of appeals. Nor is there any such reason. The denial of certiorari review is simply not a final decision on the merits. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting the denial of certiorari) ("Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review."); *see also Foster v. Florida*, 537 U.S. 990, 990 (2002) (Stevens, J., concurring in denial of certiorari) ("I think it appropriate once again to emphasize that the denial of a petition for a writ of certiorari does not constitute a ruling on the merits."). For that reason, a decision by the court of appeals the day after this Court denies certiorari review that equity demands modification of a prior decision is no more an abuse of the court's authority than the same decision the day before this Court denies certiorari.

Other Federal Rules of Appellate Procedure also vest in the courts of appeals the power to exercise broad control over the disposition of their cases. A court of appeals may grant a petition for rehearing *en banc* out of time, *see Young v. Harper*, 520 U.S. 143, 147 n.1 (1997); Fed. R. App. P. 40(a)(1); Fed. R. App. P. 35(c), or may *sua sponte* decide to grant panel rehearing or *en banc* rehearing, *see* 1967 Adoption, Fed. R. App. P. 35 (noting that the time limits in Rule 35 "[do] not affect the power of a court of appeals to initiate in banc hearings *sua sponte*"). The critical point is that, unless it has already issued its mandate, a court of appeals may initiate reconsideration procedures at any time. This

Court has held that if "no mandate" has "issued," a court of appeals' decision is "subject to further action on rehearing." *Forman v. United States*, 361 U.S. 416, 426 (1960); *see also* Charles Alan Wright et al., 16A *Federal Practice & Procedure* § 3986 (3d ed. 1999) ("A court of appeals has the power to entertain successive petitions for rehearing and those that are filed after the expiration of the specified period and any extension thereof, but the court can grant rehearing only while it still has jurisdiction of the case and its jurisdiction ends when the mandate issues.").

2. Petitioner's reading of Rule 41(d)(2)(D) takes no account of Rules 41(b) and (d)(1), and is thus contrary to the principle that statutes (and, by implication, rules) should be interpreted holistically, in a manner that makes each section part of a harmonious whole. *See United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citation omitted). Petitioner also seeks to convert Rule 41(d)(2)(D) into a kind of catch-all provision – an overarching Rule 41(e) – marking the end of a court of appeals' authority to stay or withhold issuance of the mandate for any reason. That violates the equally well-settled rule of construction that language of a subsection should be read in the context of that subsection, and should not extend to override the provisions of *other* subsections. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994).[10]

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[10] Petitioner's only answer is that "unlike subsection (b), there is no provision under sub-section (d)(2)(D) authorizing a delay in the issuance of the mandate following the denial of certiorari." Pet. Br. 22. That is no answer at all. The reason there is no additional Rule 41(b) principle embedded in Rule 41(d)(2)(D) is because Rule 41(b) itself completely resolves the question.

3. Aside from lacking any support in the text or history of the Rule, petitioner's attempt to read a court's discretion under Rules 41(b) and (d)(1) out of existence would have adverse consequences that are contrary to longstanding appellate practice. And, because petitioner's argument rests on a construction of Rule 41, a rule of general application, those consequences would not be confined to habeas cases.

Under petitioner's view, courts of appeals would lack their traditional authority to reconsider cases in which a litigant, as petitioner here, bypasses rehearing and rehearing *en banc* procedures by appealing immediately to this Court. Such a reading would provide courts of appeals with the perverse incentive to rush to beat the certiorari petition clock to vacate a previously-issued decision. The ability of courts of appeals to correct errors – a vital function this Court cannot be expected to perform – would suffer dramatically and needlessly as a result of petitioner's interpretation of the Rule.[11] Petitioner's view would similarly undermine the courts of appeals' ability to police themselves, and interfere with their governing processes for reconsidering previously-issued decisions.[12]

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[11] "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." Robert L. Stern, et al., *Supreme Court Practice* Ch. 4.17, at 255-57 (8th ed. 2002) (collecting statements to this effect by individual Justices and the Court, and noting Supreme Court Rule 10). Accordingly, that function falls principally on the courts of appeals. *See Calderon*, 523 U.S. at 569 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (noting that the courts of appeals' rehearing processes are vital to review panel decisions, as it is "axiomatic that this Court cannot devote itself to error correction"); *see also Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 259-60, 270-71 (1953) (noting the importance of en banc review in correcting errors).

[12] The Federal Rules of Appellate Procedure recognize the control appellate courts possess over reconsideration. Rule 40 establishes that a peti-

By contrast, reading Rule 41(b) and (d)(1) to permit a court of appeals to decide when to issue the mandate, even following the denial of certiorari, would have the salutary effect of ensuring that the courts of appeals can continue to correct their own errors and operate their own rehearing and *en banc* processes without regard to the certiorari clock. This Court should decline petitioner's invitation to turn a generally-applicable procedural rule into one that would significantly alter the rehearing practices of the circuits.

4. Petitioner's view is also incompatible with the language and history of Rule 41(c), which provides that the "mandate is effective when issued." Fed. R. App. P. 41(c). Petitioner's view is that, when a court of appeals receives an order from this Court denying certiorari, the court of appeals "must immediately" issue the mandate under any circumstance, and that any delay in issuing the mandate is beyond the court's authority. The necessary consequence of that reading is that the mandate of a court of appeals is effective when it *should have* issued under Rule 41(d)(2)(D). That is directly contrary to the language of Rule 41(c), which makes the mandate effective, not when it "should" issue, but when it does issue.

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tion for panel rehearing must be filed within 14 days of the entry of judgment, "[u]nless the time is shortened or extended by order or local rule." Fed. R. App. P. 40(a)(1); *see also* Fed. R. App. P. 35(c) (same for *en banc* petitions). The Rules do not place any limitation on when a court may *sua sponte* seek rehearing *en banc*. *See* 1967 Adoption, Fed. R. App. P. 35 (noting that the rule "does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*"). This is significant because, although courts of appeals exercise their rehearing power sparingly, *see* Douglas M. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991-2002*, 70 Geo. Wash. L. Rev. 259, 263 (2002), "most en banc hearings result from actions by the court's own judges, that is, from sua sponte en banc calls," Stephen L. Wasby, *The Supreme Court and Courts of Appeals En Banc*, 33 McGeorge L. Rev. 17, 19 (2002).

If there were any doubt, the history of Rule 41(c) eliminates it. Prior to Rule 41(c)'s formal adoption in 1998, the Department of Justice had previously proposed that, because "there is often a delay in issuing the mandate ... the rule [should] provide that the mandate is effective on the date that the *clerk* should issue it, in accordance with the rules, even if it is not issued, on that date because of clerical delay." Minutes of the Mtg. on the Adv. Com. on Appellate Rules, Judicial Conf. of the United States, 1994 WL 880349, at *14 (Oct. 25, 1994) (emphasis added). The Advisory Committee rejected that proposal, noting:

> The mandate should be effective when issued, not when it should issue. *A judge may delay issuance of the mandate*. If a mandate is not issued on the date established by the rules and the approach advocated by the Department of Justice were accepted, one would have to determine whether the delay was the result of *clerical delay or judicial intervention.*

Id. (emphasis added).

The Advisory Committee thus made clear its conclusion that – contrary to petitioner's view – a mandate is "effective" only when issued, and that a court of appeals has the authority to "delay" issuance of the mandate. That understanding should be given "weight" in assessing petitioner's claim. *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("Although the Advisory Committee's comments do not foreclose judicial construction of the Rule's validity and meaning, the construction given by the Committee is 'of weight.'") (quoting *Mississippi Publishing Corp. v. Murphee*, 326 U.S. 438, 444 (1946)). Indeed, in light of the clear history of the Rule, the Court should reject petitioner's contrary reading. *See Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974) (deletion of provision from bill in committee strongly militated against finding that Congress intended a result it had expressly declined to enact).

B. Petitioner Cannot Show That Rule 41 Displaces the Historical Exercise of Inherent Power Over the Mandate.

Petitioner's reading of Rule 41 also ignores that courts have for centuries exercised power to reconsider their decisions before relinquishing jurisdiction over a case. Given the history of appellate court control over the mandate, even if the proper interpretation of Rule 41 were a close question, it should be resolved against petitioner. That would be true in any case, but it is especially true because petitioner reads Rule 41(d)(2)(D) as to deprive the court of appeals of jurisdiction at the moment it receives word that this Court has denied certiorari.

1. Before the Founding, English courts of equity had wide-ranging power to modify judgments after issuing them. Equity courts could "reconsider a decision and correct and revise a previously expressed opinion" whenever such revision was in the interest of justice, up until the point at which the Chancellor affixed his Great Seal. Rosemary Krimbel, *Rehearing Sua Sponte in the United States Supreme Court: A Procedure for Judicial Policymaking*, 65 Chi.-Kent L. Rev. 919, 929-30 (1989); *see also* Ronan E. Degnan & David W. Louisell, *Rehearing in American Appellate Courts*, 34 Can. B. Rev. 898, 904 (1956). Although less sweeping in their power, English law courts could "vacate or modify a judgment or decision during the term of court in which it was entered." Degnan & Louisell, *supra* at 903.

As a result of the merger of law and equity in this country, this Court adopted the "End of Term" Rule – a modified version of the old English rule for law courts. In *Bronson v. Schulten*, 104 U.S. 410 (1881), this Court observed that "[i]t is a general rule of the law that all the judgments, decrees, or other orders of the courts, *however conclusive in their character*, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified,

or annulled by that court." *Id.* at 415 (emphasis added). Any "steps" taken by a court "during that term" to modify a decision were thus well within the court's power. *Id.* By contrast, this Court explained, "all final judgments and decrees of the court pass beyond its control" at the end of the term. *Id.* Thereafter, "if errors exist they can only be corrected . . . by a writ of error or appeal as may be allowed in a court which, by law, can review the decision." *Id.*

Congress abolished the "End of Term" Rule in 1948. *See* 28 U.S.C. § 452. Rather than narrowing a court's ability to modify its opinions while it maintained jurisdiction over a matter, the effect of Section 452 was to eliminate the end of a term as the point at which a judgment "pass[ed] beyond [the] control" of a court of appeals, *Bronson*, 104 U.S. at 416, leaving the "federal courts *untrammeled* in establishing their own rules of finality." *United States v. Ohio Power Co.*, 353 U.S. 98, 102-03 (1957) (Harlan, J., dissenting) (emphasis added). This Court noted that "[w]e have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." *Id.* at 99.

Since 1948, the point at which a judgment "pass[es] beyond [the] control" of a court of appeals has been the moment at which it issues the mandate. *See Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) ("Until the mandate issues, the case is 'in' the court of appeals . . . ."); *Rivera*, 844 F.2d at 921 ("Simply put, jurisdiction follows the mandate."); *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988) ("An appellate court's decision is not final until its mandate issues."); *Johnson v. Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) ("Issuance of the mandate formally marks the end of appellate jurisdiction."); *Alphin*, 552 F.2d at 1035 ("Our control over a judgment of our court continues until our mandate has issued."). Petitioner concedes as much. Pet. Br. 26. Issuance of the mandate is thus an "event of considerable institutional signifi-

cance." *Rivera*, 844 F.2d at 921; *Miles v. Stainer*, 141 F.3d 1351, 1352 (9th Cir. 1998).

Accordingly, until issuing its mandate, a court of appeals possesses broad discretion to modify its judgment. *See Wilson v. Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004) ("The mandate of the court has not yet issued in this case, and therefore, we may, at our discretion, 'amend what we previously decided to make it conform,' to the facts of the case, without need of finding that the case presents the sort of 'grave, unforeseen contingencies,' which would be necessary to recall a mandate that had already issued.") (citation omitted); *Miles*, 141 F.3d at 1352 ("Until [the issuance of the mandate], this court retains jurisdiction and is capable of modifying or even revoking a judgment. . . .") (citations omitted); *First Gibraltar Bank*, 42 F.3d at 898 (5th Cir. 1995) ("Because the mandate is still within our control, we have the power to alter or to modify our judgment."). Again, petitioner concedes the point. *See* Pet. Br. 26 (noting that a court has "the power to alter or modify the judgment prior to the issuance of its mandate").

Given this history of broad control over a judgment while an appellate court retains jurisdiction over a case, petitioner must show that Rule 41 of the Federal Rules of Appellate Procedure affirmatively displaces that power. It cannot be "'lightly assume[d] that Congress has intended to depart from established principles' such as the scope of a court's inherent power." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). This Court has declined to assume the curtailment of longstanding judicial power absent a clear expression from Congress. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 631-32 (1962) (declining to find court's inherent power to dismiss a case *sua sponte* for lack of prosecution abrogated without "a much clearer expression of purpose than [Federal] Rule [of Civil Procedure] 41(b) provides for us"); *Chambers*, 501 U.S. at 42-43 & n.8 (declining to find court's inherent power to award sanctions supplanted by, *inter alia*, 28 U.S.C. § 1927, Fed. R. Civ. P. 11, Fed. R. Civ. P. 16(f), Fed. R. Civ. P.26(g), Fed. R. Civ. P. 30(g), Fed. R. Civ. P. 37, Fed. R. Civ. P. 56(g)).[13] As explained above, petitioner cannot make the requisite showing.

2. The historical exercise of control over the mandate is also evidence that a court of appeals possesses "inherent power" to retain jurisdiction over a case until assured that it has correctly resolved the issues presented. That is exactly the power the court of appeals asserted here. Pet. App. 6.

Nearly two centuries ago, this Court recognized that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution." *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Since then, this Court has on numerous occasions determined that specific judicial actions are "necessary" to the appropriate exercise of federal courts' Article III power. The list of recognized powers includes the authority to dismiss a case *sua sponte* for failure to prosecute, *Link*, 370 U.S. at 629-30, dismiss a case *sua sponte* on *forum non con-*

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[13] In *Carlisle v. United States*, 517 U.S. 416 (1996), this Court held that Federal Rule of Criminal Procedure 29 barred a district court from granting an untimely motion for judgment of acquittal or *sua sponte* entering such a judgment. *Id.* at 433. Similarly, in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), this Court concluded that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)." *Id.* at 254. But *Carlisle* and *Bank of Nova Scotia* are the exceptions that prove the general rule. Neither Rule 29 nor Rule 52(a) was susceptible to more than one interpretation – thus both cases dealt only with the straightforward question of whether a federal court's power could trump an express Congressional command. Moreover, in *Carlisle*, this Court's decision was based in part on the fact that this Court was "unaware of any 'long unquestioned' power of the federal district courts to acquit for insufficient evidence *sua sponte*, after return of a guilty verdict." 517 U.S. at 426. The power at issue in *Carlisle* was not one that actually fell within the federal courts' traditional powers – accordingly, the general rule of construction was not implicated.

veniens grounds, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-08 (1947), stay proceedings and "control the disposition of the causes on [the court's] docket," *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), order restitution, *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co.*, 249 U.S. 134, 146 (1919), "control admission to its bar and to discipline attorneys who appear before it," *Chambers*, 501 U.S. at 43 (citing *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824)), punish contempts, *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874), remove disruptive litigants, *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970), award attorney's fees, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), appoint private attorneys to prosecute contempt proceedings, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795 (1987), and vacate a prior judgment obtained by fraud on the court, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

This list is far from exhaustive. As a general principle, a court of appeals' inherent powers are derivative of either "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Link*, 370 U.S. at 630-31, or the authority "inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co.*, 249 U.S. at 146.

The court of appeals' decision in this case to invoke its "inherent power to reconsider [its] opinion prior to the issuance of the mandate," Pet. App. 6, was fully consistent with these precedents. The power of a court of appeals to delay issuing its mandate until convinced it has reached the correct result in a case, particularly if convinced that the prior decision is in clear error, or if the court's process has been abused to achieve an unfair result, is part of the "irreducible" core of a federal court's power. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562 & n.7 (3d Cir. 1985) (noting cases

holding that deciding when to issue mandate is an "irreducible inherent" judicial power) (citing *Burton v. Mayer*, 118 S.W.2d 547 (Ky. 1938)).[14] This Court should reject petitioner's reading of the Rule, which would strip courts of appeals of that power.

3. Similarly problematic is that petitioner's reading of Rule 41(d)(2)(D) is a jurisdictional one. As noted above, Rules 41(b), (c), and (d)(1) vest in the courts of appeals the authority to determine when to issue its mandate and, therefore, when to terminate its jurisdiction over a case. By contrast, petitioner construes Rule 41(d)(2)(D) to deprive a court of appeals of jurisdiction the moment it receives word that this Court has denied certiorari. Although petitioner concedes at one point that a court of appeals "[u]ndoubtedly" has jurisdiction over a matter until issuing a mandate, Pet. Br. 26, that is at odds with the remainder of his argument. Petitioner states that Rule 41(d)(2)(D) leaves "no room for the discretion by the court," Pet. Br. 22, and also equates a decision to withhold issuance of a mandate at that time to a decision to recall a mandate, asserting that both decisions should be subject to the same standard of review. The clear implication of that position is that the court of appeals has no more control over the adjudication of a case post-denial of certiorari than it does after it issues its mandate. And since control over the mandate is concomitant with jurisdiction, it is difficult to view petitioner's reading of Rule 41 as requiring anything less than jurisdictional divestiture following this Court's denial of certiorari.

That jurisdictional reading of the Rule is yet another reason petitioner cannot sustain his burden of showing that Rule

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[14] *See also State ex rel. Kostas v. Johnson*, 224 Ind. 540, 550 (1946) ("We conclude, therefore, that the statute involved constitutes legislative interference with the judiciary and to the extent that it requires action by courts within specified times and deprives the courts of jurisdiction for failure to act within such time, is unconstitutional and void.").

41(d)(2)(D) completely displaces the authority of a court of appeals to delay issuance of its mandate. The Federal Rules of Appellate Procedure do not, as a general matter, limit a court of appeals' jurisdiction. Rule 1(b) previously provided that the rules "shall not be construed to extend or *limit* the jurisdiction of the courts of appeals as established by law." Although that provision was abrogated in 2002, the Advisory Committee specifically noted that the reason for the abrogation was that Congress had affirmatively empowered the Committee to make *certain* changes to the court of appeals' jurisdiction. Fed. R. App. P. 1(b), 2002 adv. com. note ("Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will 'extend or limit the jurisdiction of the court of appeals,' and subdivision (b) will become obsolete."). Not one of those changes, however, is before the Court or involves Rule 41. Given the 35-year period during which Rule 1(b) co-existed with Rule 41, any reading of Rule 41 that rendered it a curtailment on federal jurisdiction would be suspect. *Cf. United States v. Sasser*, 971 F.2d 470, 473-74 (10th Cir. 1992) (rejecting construction of Federal Rule of Appellate Procedure 4(b) that would extend time limit for government to file cross-appeal because such construction would extend appellate court jurisdiction).[15]

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[15] Time limits, even if imposed by Congress by way of a statute, are also generally not jurisdictional. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) ("Nor, since *Brock*, have we ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later.") (citing *Brock v. Pierce County*, 476 U.S. 253 (1986)). Completion of a task generally takes precedence over a deadline that would force a federal entity to stop halfway through the process. *See id.* at 160-61 ("The *Brock* example consequently has to mean that a statute directing official action needs more than a mandatory "shall" before the grant of power can sensibly be read to expire when the job is supposed to be done.").

II. FAR FROM SUPPORTING PETITIONER'S VIEW, *CALDERON* HOLDS THAT IT IS ISSUANCE OF A MANDATE DENYING RELIEF – NOT THE DENIAL OF CERTIORARI – THAT MAKES A FEDERAL HABEAS APPEAL "FINAL."

Petitioner contends that the denial of certiorari review by this Court made Thompson's appeal "final," such that *any* delay in issuing the mandate could only be justified under circumstances warranting recall of the mandate from another court. Petitioner's fundamental argument is that this Court's decision in *Calderon v. Thompson*, 523 U.S. 538 (1998), supports his view that the court of appeals lacked authority to reconsider its original opinion absent a finding that its action was necessary to avoid a "miscarriage of justice." Pet. Br. 15-16. Petitioner is mistaken.

A. Petitioner's Arguments are Directly Contrary to *Calderon*.

At issue in *Calderon* was the power of a court of appeals to recall its mandate in a capital habeas case. There, the Ninth Circuit Court of Appeals issued its mandate and, 53 days later, just two days before the scheduled execution, reasserted jurisdiction to resolve the ineffective assistance of counsel claim presented in the petitioner's first federal habeas petition. 523 U.S. at 548. Although the petitioner had filed a motion to recall the mandate, the *en banc* court asserted that it was acting *sua sponte* and had decided to recall the mandate based solely on the claims presented in the first federal habeas petition. *Id.* This Court reversed, concluding that the court of appeals' exercise of its recall power constituted an abuse of discretion. *Id.* at 566. The Court held that, "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.* at 558.

In setting that strict standard, this Court repeatedly identified issuance of a mandate denying habeas relief as the moment at which the state court could execute its judgment with the assurance that the federal courts' review had come to an end. The Court could not have been more explicit on this point: "A State's interests in finality are compelling when a federal court of appeals *issues a mandate* denying habeas relief. *At that point* . . . the State is entitled to the assurance of finality." *Id.* at 556 (emphasis added); *see also, e.g., id.* at 557 (noting that the court's recall came "a full 53 days after issuance of the mandate"); *id.* at 556 ("When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension."); *id.* ("Relying upon the mandate denying habeas relief to Thompson, the State of California had invoked its entire legal and moral authority in support of executing its judgment."); *id.* at 550 ("In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, however, the power [to recall] can be exercised only in extraordinary circumstances."). The Court thus made plain that the "assurance of *real* finality" that enables the state to "execute its moral judgment" attaches when the federal court of appeals issues its mandate denying habeas relief. *Id.* at 556 (emphasis added).

This Court also made clear that the miscarriage of justice standard applies only to the limited subset of cases in which a court of appeals recalls a mandate that has already been issued, and has no bearing on cases arising out of a number of *other* circumstances – including, for example, "a case where the mandate is stayed under Federal Rule of Appellate Procedure 41 pending the court's disposition of a suggestion for rehearing en banc." *Id.* at 557.[16] Petitioner's wholesale

[16] There is no reason to distinguish a case in which the mandate has been stayed pending *en banc* review from a case in which the mandate has been withheld or stayed pending panel rehearing.

reliance on *Calderon* as setting forth the standard for reviewing the decision of a court of appeals to stay or withhold issuance of its mandate is, for this reason as well, contrary to the terms of the decision.

Perhaps most tellingly, this Court in *Calderon* expressly rejected petitioner's precise argument that a case became final at some point prior to the issuance of the mandate. There, the State of California asserted – as Petitioner does here, Pet. Br. 16, 25-33 – that the court of appeals' decision became "final" upon the denial of certiorari by this Court, and that, as a result, any action thereafter could only be justified by the extraordinary circumstances permitting the recall of a mandate. Br. of Petitioner, *Calderon v. Thompson* (No. 97-215), 1997 WL 578173 at *16-17 (citing *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)); Reply Br. of Petitioner, *Calderon v. Thompson* (No. 97-215), 1997 WL 714676 at *12 (same).[17] The Court rejected that argument, holding that, for purposes of deciding when a case has become "final" in *this* context, the critical event is issuance of the mandate. *Calderon*, 523 U.S. at 556-57. The Court did not, as petitioner would have it, attach *any* significance to its previous denial of certiorari. *Cf. id.* at 557 (listing several critical dates that preceded the court's recall of its mandate, including the "issuance of the mandate," but excluding mention of the denial of certiorari). Petitioner's argument is thus little more than an attempt to relitigate a battle lost in *Calderon*.

[17] The State took the same view at oral argument:

JUSTICE KENNEDY: How do you define when the first court of – habeas corpus proceeding comes to a close?

MS. WILKENS: That would be with the denial of certiorari by this Court or the expiration of time for seeking certiorari. . . .

JUSTICE KENNEDY: And what's the authority you have for that?

MS. WILKENS: Griffith v. Kentucky, Your Honor.

The Oyez Project, Oral Arg. Tr., *Calderon v. Thompson*, *at* http://www.oyez.org/oyez/resource/case/1014/argument/transcript.

Although there is no need to reconsider the point, the *Calderon* Court's conclusion was fully consistent with the principle that "[a]n appellate court's decision is not final until its mandate issues." *Lingle*, 847 F.2d at 97. As this Court has recognized, a court of appeals is free to revisit a prior decision on panel or *en banc* rehearing until the mandate issues. Courts of appeals may – and sometimes do – delay issuance of their mandates following the denial of certiorari, and may thereafter vacate their prior decisions. As part of that process, a court of appeals may (as here) require further proceedings in the district court. Petitioner's contrary view that, despite all of this, this Court's denial of certiorari makes a federal habeas appeal "final," is untenable.

Indeed, it is precisely because the power to recall a previously-issued mandate is so "extraordinary," *id.* at 550, that a court of appeals has *ordinary* discretion to determine when to issue its mandate in the first instance. Properly understood, *Calderon* is but the latest in a long line of authority – beginning with *Bronson* – to recognize that a court has far greater discretion to take "steps" to alter or modify their decisions before they become final and "pass beyond its control." *Bronson*, 104 U.S. at 415-16. Far from supporting petitioner's view, *Calderon* makes clear that a court of appeals signals to the states that habeas proceedings are complete only by issuing a mandate denying relief. Accordingly, the "miscarriage of justice" standard does not apply here.

B. The Other Contexts Petitioner Invokes are Inapposite.

Lacking support in *Calderon*, petitioner argues that other contexts show that Thompson's federal habeas petition became "final" when this Court denied certiorari review, even though the court of appeals did not thereafter issue its mandate. *Cf. Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality is variously defined; like many legal terms, its precise meaning depends on context."). Even if this Court had not already rejected that view in *Calderon*, not one of

those contexts has any bearing on this case. To the contrary, the only cases petitioner cites that are relevant to the question here support Thompson.

Petitioner first cites 28 U.S.C. § 1257(a), which empowers this Court to review a "final judgment" of a state court of last resort. Pet. Br. 26-28. "Finality for purposes of § 1257(a)," says petitioner, "is not contingent upon the issuance of an appellate court mandate." *Id.* at 27. That is true. It is also irrelevant. State appellate courts are, like federal courts of appeals, affirmatively empowered to stay the issuance of *their* mandates pending the resolution of certiorari review by this Court. *See, e.g.*, Tenn. R. App. P. 42(c) ("In cases in which review by the Supreme Court of the United States may be sought, the appellate court whose decision is sought to be reviewed or a judge thereof . . . may stay the mandate."). It is neither surprising nor important to this case that this Court may review "final judgments" even in cases in which the highest court of a State, or a federal court of appeals, has itself stayed the issuance of the mandate. A contrary view would mean that, by staying the issuance of a mandate, an appellate court (state or federal) could also bar certiorari review as a jurisdictional matter. *Cf. Market St. Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551-52 (1945) (noting that the "latent powers" of state courts to reconsider their judgments "are too variable and indeterminate to serve as tests of our jurisdiction").[18]

Petitioner also invokes both 28 U.S.C. § 2244(d)(1) and the retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989), to conclude that a decision becomes "final" when the "time for filing a petition for a writ of certiorari has elapsed

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[18] *Market Street Railway Co.* does not support petitioner. *See* Pet. Br. 26. It held only that an appellate court's "latent power" to reconsider a decision does not deprive this Court of jurisdiction; not that, as petitioner suggests, a decision to exercise that "latent power" after this Court denies certiorari is a nullity.

or a timely filed petition has been finally denied." Pet. Br. 28-29 (quoting *Caspari v. Bohlen*, 510 U.S. 333, 390 (1994)). Those contexts have nothing to do this case. Both involve petitions for certiorari filed directly from the highest court of a State, and seek to draw a bright-line for when "finality" attaches to the expiration of direct review of *that* decision. There is no question under those circumstances as to whether it is the denial of a petition for certiorari, or a federal appellate court's issuance of its mandate, that makes the case "final": At the point at which a state conviction could possibly become "final," *there is no federal appellate court mandate*. That this Court has adopted a denial-of-certiorari based finality rule to mark "'the important distinction between direct review and collateral review,'" *Teague*, 489 U.S. at 307 (internal quotation marks omitted), and that Congress has done the same to mark the running of the limitations period in which a state prisoner may file a habeas petition in federal district court, 28 U.S.C. § 2244(d)(1)(A), bears no relevance to the question presented in this case.

Petitioner's reliance upon AEDPA is doubly misplaced because the scope of AEDPA is not before the Court. *See infra* nn. 23-24. This Court expressly denied review of those questions. Petitioner's *amicus*, in fact, concedes that the court of appeals' decision was consistent with AEDPA. Br. *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 14 ("Br. *Amicus Curiae*"). Still, both petitioner and his *amicus* attempt to address AEDPA through the back door, suggesting that its principles "inform" the analysis. *See id*; Pet. Br. 29. AEDPA only decides what "finality" triggers the limitations period for seeking habeas review in federal district court. *Compare* 28 U.S.C. § 2244(d)(1) *with* Fed. R. App. P. 41(c), 1998 adv. com. note ("[a] court of appeals' judgment or order is not final until

issuance of the mandate").[19] It is difficult to see how AEDPA could possibly "inform" the analysis of the proper construction of Rule 41, a rule of general application that cannot be confined to habeas cases. In any event, to the extent AEDPA informs the analysis, this Court decided in *Calderon* that it is issuance of the mandate that marks the critical "finality" point in this context.

Similarly mistaken is petitioner's assertion that *Clay*, 537 U.S. at 522, is "particularly instructive" in its decision to reject a "mandate-based definition" of finality in favor of one defined by the Court's resolution of a petition for a writ of certiorari. Pet. Br. 30. The question in *Clay* was what event – denial of certiorari or issuance of the mandate – begins to run the one-year time limitation for post-conviction relief under 28 U.S.C. § 2255. That rule of finality has nothing to do with when a decision of a court of appeals is "final," but simply addressed the triggering event for statutory timeliness purposes. Nor did *Clay* reject the "mandate-based definition" of finality, as Petitioner suggests, because it was "merely 'ministerial'." Pet. Br. 33. Rather, the Court's holding rested on the need to align the Court's and Congress' restrictions on the ability of habeas petitioners to seek collateral review – specifically, the need to conform the time limits set forth in the habeas statute for federal prisoners (§ 2255) with those in the statute for state prisoners (§ 2244(d)(1)). *Clay*, 522 U.S. at 527-31. Nothing in the Court's decision minimizes the jurisdictional significance of

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[19] Nothing in AEDPA evinces an intent to limit the power of federal appellate courts to *sua sponte* revise their decisions prior to the relinquishment of jurisdiction. *Compare Tyler v. Cain*, 533 U.S. 656, 661 (2001) ("AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications.") *with Triestman v. United States*, 124 F.3d 361, 367 (2d Cir. 1997) (noting that AEDPA's restrictions "do[ ] not purport to limit the court's own power to review its decisions or to undertake a rehearing" on its own initiative).

the mandate's issuance; to the contrary, the Court expressly acknowledged that "finality attends issuance of the appellate court's mandate" in other contexts. *Id.* at 527.

3. Petitioner also fails to appreciate the significance of cases he cites rejecting his view. Petitioner notes, for example, that for certain purposes under the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, and the former version of Federal Rule of Criminal Procedure 33, "some courts have held that finality attaches upon issuance of the appellate court's mandate." Pet. Br. 31 n. 14. According to petitioner, "a mandate-based definition of finality in those contexts is entirely reasonable" because "[i]ssuance of the mandate is necessary to transfer jurisdiction back to the district court" for further proceedings. *Id.* That is no distinction at all. As the decision below illustrates, a federal appellate court's mandate will sometimes *require* further evidentiary proceedings in the district court, rather than denying all habeas relief. *See* 28 U.S.C. § 2254(e).[20]

Petitioner's focus on whether further proceedings are necessary in the lower courts also ignores that issuance of a mandate denying relief signals the end of *appellate proceedings*. The Speedy Trial Act, for example, sets a 70-day limit on when a criminal defendant may be tried or retried following an appeal, mistrial, order for new trial, or a collateral attack. 18 U.S.C. § 3161(d)(2) (providing that the time for trial or retrial "shall commence within seventy days from the date the action occasioning the trial becomes final."); *id.* § 3161(e) (same for "retrial"). The courts of appeals that have addressed this issue have concluded that the appellate court's decision only becomes "final" upon issuance of the mandate, and that the limitations period runs from that date. *See*

[20] Petitioner's suggestion that a court of appeals may not, following the denial of certioriari, issue a mandate instructing the district court to conduct a hearing is based on his flawed jurisdictional reading of Rule 41(d)(2)(D). *See* Pet. Br. 20.

Rivera, 844 F.2d at 920 (noting that six circuits that have addressed the issue have adopted the mandate-based rule); *see also United States v. Long*, 900 F.2d 1270, 1276 (8th Cir. 1990) (holding that the Speedy Trial Act's clock commences once the district court *receives* the mandate); *United States v. Lasteed*, 832 F.2d 1240, 1243 (11th Cir. 1987) (same).[21] The rationale is that, "[s]imply put, jurisdiction follows the mandate." *Rivera*, 844 F.2d at 921; *see United States v. Ross*, 654 F.2d 612, 616 (9th Cir. 1981) (noting that "a case is not closed" until the mandate issues, as the "parties may petition the court for a rehearing" and the "court may decide to rehear the case en banc") (citing Fed. R. App. P. 40 and 41). The same is true here.

For similar reasons, the courts of appeals uniformly concluded that the two-year limitation period in the former Rule 33 for a motion for a new trial based on newly discovered evidenced began to run after the issuance of the appellate mandate. *See United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995) (collecting cases from other circuits in agreement).[22] Three of those courts explicitly concluded that the "date of the denial of a petition for writ of certiorari by the United States Supreme Court is irrelevant" for purposes of finality under Rule 33. *United States v. Spector*, 888 F.2d 583, 584 (8th Cir. 1989); *United States v. Lussier*, 219 F.3d 217, 218 (2d Cir. 2000) (same); *United States v. Cook*, 705 F.2d 350, 351 (9th Cir. 1983) (same).

[21] One court has specifically rejected a certiorari-based finality rule for Speedy Trial Act purposes. *See United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1989) ("An application to seek certiorari or a decision to make such application has no effect on the finality of an appellate decision unless the mandate of the court is stayed or withdrawn in connection with such event.") (citing Fed. R. App. P. 41(b)).

[22] Rule 33 was amended in 1998 to make the date of the trial court's verdict the "triggering event" for the filing of a motion for a new trial, rather than the date of the appellate court's "final judgment." Fed. R. Crim. P. 33, 1998 adv. com. note.

Thus, by petitioner's own account of the caselaw, "finality" is triggered in cases in which the relevant question is when appellate proceedings have concluded by issuance of the mandate alone. There is no need to belabor the point. In this precise context, this Court has identified issuance of the mandate denying habeas relief, not the denial of certiorari review, as the critical point of "finality."

C. Petitioner's Reliance Arguments are Misplaced.

Petitioner also contends that he was entitled to rely upon this Court's denial of a petition for a writ of certiorari as a signal that federal review was at an end. Thus, petitioner contends, he was unfairly surprised by the decision of the court of appeals to vacate its prior order. This account is both legally untenable and factually insupportable.

As to the law: Contrary to petitioner's arguments, the court of appeals was not stripped of jurisdiction by this Court's denial of the petition for a writ of certiorari. Accordingly, any supposed "reliance" petitioner placed on the denial of the petition was simply misplaced. *See, e.g., United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990) ("The legitimacy of an expectation of finality of an appellate court order depends on the issuance or not of the mandate . . . ."). The *Calderon* Court repeatedly emphasized that "real finality" attaches only when the mandate has issued. *Calderon*, 523 U.S. at 556.

Moreover, despite denying Thompson relief, the federal district court, on February 17, 2000, entered a stay of Thompson's execution "pending any appeal." J.A. 89. Because the court of appeals never issued its mandate, Thompson's habeas appeal was never final, and the district court's stay remained in effect when petitioner *moved* for an execution date. Petitioner's motion for an execution was thus "void." 28 U.S.C. § 2251. Petitioner's representation to the Tennessee Supreme Court that Thompson had "completed the standard three-tier appeals process, making the setting of

an execution date appropriate," BIO App. 219, also failed to mention that the mandate had not issued, rendering the motion improper under Tennessee law. *See* Tenn. Sup. Ct. R. 12.4(a) (requiring the State to file a motion to schedule an execution with the court "*[a]fter*" the prisoner has "*completed* the standard three-tier appeals process") (emphasis added); *Tennessee v. Alley*, No. M1991-00019-SC-DPE-DD, (Tenn., Jan. 6, 2005), *available at* http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/Alley/Alley.htm (denying State's motion to set execution date as "premature" where court of appeals had not issued mandate); *cf. Ohio v. Scott*, 741 N.E.2d 535, 535 (Ohio 2001) (denying motion to set execution date as "premature" and ordering State, *inter alia*, "to file notice when the United States Court of Appeals for the Sixth Circuit issue[s] its mandate").

Petitioner's view is also incorrect as to the facts. After the court of appeals denied Thompson's petition for rehearing *en banc*, Thompson sought and received an order staying the mandate pending this Court's resolution of his petition for writ of certiorari. On August 19, 2003, while Thompson's certiorari petition was pending, *petitioner* moved the court of appeals to reconsider its July 26, 2002, order expanding counsel's appointment to include state court proceedings – a motion that was unresolved at the time this Court denied certiorari but that was critical in subsequent state court proceedings. The docket sheet indicates that, shortly after the State filed the motion to reconsider, the court of appeals recalled the case record from the district court – an unusual step, to be sure, for a court that had already issued a "final" opinion. In addition, this Court denied Thompson's petition for writ of certiorari on December 1, 2003, and despite the State's reading of Rule 41(d)(2)(D), the court of appeals, acting on Thompson's motion, continued the stay of the mandate pending resolution of Thompson's petition for rehearing.

For these reasons, petitioner was at the very least on constructive notice that the court of appeals had not issued its mandate. And, given that a federal court stay was in effect "pending" the "appeal," petitioner should have been on heightened alert as to the need to obtain the mandate before returning to State court. *See* 28 U.S.C. § 2251. Nevertheless, petitioner took no steps to ensure that the decision was final. To the contrary, even before the court of appeals received this Court's order denying the petition for rehearing, petitioner filed a motion to schedule Thompson's execution in the Tennessee Supreme Court, in which he represented that "Thompson has completed the standard three-tier appeals process, making the setting of an execution date appropriate" under state law. BIO App. 220. At a minimum, petitioner failed to exercise due diligence to ensure that the mandate had issued and that federal proceedings had ended. *See Rivera*, 844 F.2d at 920 (noting that a "diligent appellate attorney" should "ascertain[ ] when the mandate issues"); *id.* at 921 (noting that neither party "called the court's attention to the fact that the mandate was not issued on the 21st day, nor did any party move for issuance of the mandate"); *see also* Fed. R. App. P. 41, 1998 adv. com. note (noting that "the parties can easily calculate the anticipated date of issuance and *verify* issuance of the mandate) (emphasis added).

D. Courts of Appeals Are Not Abusing Their Power to Withhold Issuance of the Mandate.

There is no dispute that, if not sparingly exercised and "limited to the most rare and extraordinary case[s]," the recall power at issue in *Calderon* is subject to abuse. *Calderon*, 523 U.S. at 558; *see id.* at 569 (Souter, J., dissenting) ("[T]here lurks in the background the faint specters of overuse and misuse of the recall power."). Thus, the heightened threshold that an appellate court has historically had to meet before recalling its mandate, *see, e.g., Alphin*, 552 F.2d at 1035 ("to avoid injustice" in "exceptional cases"), and that an appellate court must now satisfy in the federal habeas

context, *see Calderon*, 523 U.S. at 558 ("miscarriage of justice"), provides structural assurance that the exercise of the recall power remains an extraordinary occurrence.

Petitioner suggests that the same concerns are present here. As this case illustrates, that is not so. The court of appeals here denied relief, denied rehearing, and denied rehearing *en banc*. This Court then denied certiorari review. There is little reason to believe that a panel initially denying habeas relief will, following the denial of panel rehearing, *en banc* review, and certiorari review by this Court, thereafter *grant* habeas relief for anything other than compelling reasons.

Nor is there any suggestion by petitioner that the court of appeals had anything less than a compelling reason to modify its prior decision in this case. This is a case in which the same panel that denied relief to a habeas petitioner decided unanimously to withdraw its previous opinion. It is also a case in which the "initiative" for the new decision came from the judge who authored the original (and now withdrawn) opinion. Pet. App. 8 (Suhrheinrich, J., concurring in part and dissenting in part) ("I wish it to be known that the initiative for this decision came from my chambers. The majority's ruling is based upon their review of my draft opinion, prepared after my discovery, and the hundreds of hours of work that followed, reviewing the entire record, researching the law, and drafting this opinion."). Moreover, the reason for the modification was a clear error in the prior decision – that is, to correct the erroneous conclusion that there was no factual dispute over Thompson's mental illness at the time of the offense. Far from an abuse, the court properly performed its duty to undo "what it had no authority to do originally, and in which it, therefore, acted erroneously" – a classic ground for reconsideration of a previous decision. *Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891).

The concerns identified by petitioner's *amicus* are even more misplaced. Br. *Amicus Curiae* at 10-14. Much of its brief is directed toward arguing a question that is not before

this Court.[23] *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("As a general rule, . . . we do not decide issues outside the questions presented by the petition for certiorari.") (citing Supreme Court Rule 14.1(a)). The remainder is devoted to attacking a straw man. *Amicus* purports to demonstrate that "post-certiorari litigation" has become a "routine" device to evade AEDPA's successive petition limits, and contends that application of the *Calderon* miscarriage of justice standard to post-certiorari stays and reconsideration is necessary to prevent further evasion of the statute. *Id.* at 5-6.

[23] After chronicling the history and goals of AEDPA's restrictions on successive petitions, Br. *Amicus Curiae* 10-14, *amicus* concedes that "the statute does not apply" to this case, which "presumably is why this Court's grant of certiorari was limited to Question 2 [of the petition for writ of certiorari], abuse of discretion, not Question 1, violation of § 2244(b)," id. at 14. Nor could any argument be made that AEDPA's restriction on successive petitions applies here. There is no dispute that the court of appeals acted on its own initiative and not, by contrast, "pursuant to a prisoner's 'application.'" *Calderon*, 523 U.S. at 554 (quoting 28 U.S.C. § 2244(b)). Though a "court's characterization of its action as *sua sponte*" is not dispositive, the court of appeals did not consider "claims or evidence *presented*" in the prisoner's "*later* filings" that might "disprove[ ]" such a characterization. Id. (emphasis added). The court here considered the claims and evidence already before the court at the time of Thompson's first petition, leaving little doubt that it was acting on its own initiative and not upon a successive application. *See supra* at 4-6 (witness list filed with the district court noted that Dr. Sultan would testify to Thompson's mental state at the time of the crime, and that the testimony was further referenced in Thompson's reply brief and petition for rehearing before the Court of Appeals); *see also* Pet. App. 143 (referencing the deposition and accompanying record of Dr. Sultan). Thompson's Rule 60(b) motion – filed during appellate review of his first application – cannot be considered a "second or successive" application, as that motion was denied by the district court and Thompson never appealed that denial or sought to have the court of appeals take into account its contents. (Accordingly, this case does not present the issues raised in *Gonzalez v. Sec'y for Dep't of Corr.*, 125 S. Ct. 961 (2005), currently pending before this Court.) Rather, the court simply exercised its authority to supplement the record in the course of its *sua sponte* reconsideration.

But "[p]ost-certiorari litigation" is a catch-all for a number of different acts, by courts and habeas petitioners, that might arise after this Court denies certiorari – including recall of mandates, stays of mandate, the filing of successive petitions, the filing of Rule 60(b) motions, and the filing of civil suits. All but *one* of the nineteen petitioners *amicus* identifies were engaged in this "post-certiorari litigation" *after the mandate issued*. *See* Br. *Amicus Curiae*, App. A1-A7 (PACER entries reflecting that the mandate had issued following cert denial or rehearing denial, and prior to subsequent litigation, for each of the petitioners except Beardslee). To the extent that failed attempts to file successive petitions, *id.* at 7, unsuccessful motions to recall mandates, *id.* at 7-8, and two requests for a stay of mandate following denial of certiorari, only *one* of which was successful, *id.* at 8, reflect a systemic problem that threatens AEDPA's core aims, it appears that the Ninth Circuit has adequately addressed the problem. *Amicus* is simply attacking the wrong court for the wrong problem by identifying the wrong source of authority.

III. THE COURT SHOULD AFFIRM IF THE PROPER STANDARD IS ANYTHING BUT *CALDERON*

1. Petitioner's only argument in this case is that, because issuance of the mandate by the court of appeals was required "immediately" upon the receipt of this Court's order denying certiorari, the court of appeals' decision to withhold issuance of the mandate was no different than a decision to recall a mandate previously issued. It is only through reading Rule 41 as a *de facto* jurisdictional rule that petitioner can even suggest that *Calderon*'s strict test applies. Petitioner has no fallback position. Accordingly, if this Court concludes that any standard other than *Calderon* applies, it should affirm the judgment below.

For the reasons explained above, this case is unlike *Calderon*. Instead, the proper standard of review to apply to the court of appeals' decision is the ordinary test for abuse of discretion. *See, e.g., Wilson*, 357 F.3d at 464. The court of

appeals has already exercised its discretion to amend what it previously decided prior to the issuance of its mandate, and it is unnecessary to remand the case for application of a standard the court has already concluded is met.[24]

[24] The court *unanimously* agreed that the case satisfied the heightened "interests of justice" standard required to supplement the record on appeal. Pet. App. 3-4 (collecting authorities in support of power of courts of appeals to supplement record under "special" or "extraordinary" circumstances "where the interests of justice require"); *see id.* at 114-15 (Suhrheinrich, J., concurring in part and dissenting in part) (agreeing with majority that court could supplement the record because the "special circumstances" of the case, "if left unaddressed, will result in a grave miscarriage of justice"). Although not before the Court, there is no question that the court of appeals was empowered to supplement the record. Even in habeas proceedings, "ample authority exists to permit supplementation in appropriate circumstances." 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 37.1b, at 1631-32 & n.37 (4th ed. 2001) (collecting cases); *cf. Dobbs v. Zant*, 506 U.S. 357, 358 (1993) (per curiam) (court of appeals erred in rejecting habeas petitioner's motion to supplement record on appeal with closing argument transcript). This reflects the understanding that "a motion is caught by § 2244(b) and § 2255 only if it is second or successive to a proceeding that 'counts' as the first." *Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999) (district court erred in treating motion to amend pursuant to Fed. R. Civ. P. 15(a) as successive petition). As Judge Easterbrook has explained, inherent in AEDPA's grant of "one full opportunity for collateral review for every prisoner" is an "entitlement to add or drop issues while the litigation proceeds" – that is, until the prisoner has "receive[d] one complete round of litigation," which includes "exhaust[ing] appellate remedies." *Id.* at 804-05. Subsequent amendments to a petition thus do not constitute a successive application. *See id.* Similarly, enlarging the appellate record during a prisoner's first round of collateral review to include new information does not run afoul of the restrictions on successive petitions. *See, e.g., Ross v. Kemp*, 785 F.2d 1467, 1477 (11th Cir. 1986) (remanding motion to supplement record with instructions to conduct hearing on threshold issue of inexcusable neglect where defense counsel claimed to have mistakenly believed affidavits and depositions were already included in the district court record); *United States v. Kennedy*, 225 F.3d 1187, 1992 (10th Cir. 2002) ("[W]e agree with the Eleventh Circuit [in Ross v. Kemp] that, under some circumstances, we have an inherent equitable power to supplement the record on appeal."). Enlarging the record is often necessary to avoid successive litigation on a particular claim. *Ross*, 785 F.2d at 1478 (citing *Sanders v. United States*, 373 U.S. 1, 22 (1963)).

2. The record is devoid of any facts suggesting that the court of appeals abused its discretion. One reason is the nature of petitioner's litigation strategy. Petitioner did not at any time after January 23, 2004, make any inquiry into why the mandate had not issued or move for its issuance. If petitioner had so moved, the court of appeals would have been given the opportunity to explain *then* the basis of its *sua sponte* reconsideration. Indeed, even after the court of appeals vacated its prior decision, petitioner sought neither panel rehearing nor rehearing *en banc* to challenge the exercise of the panel's power – instead litigating the matter in the first instance before this Court.

In any event, the court of appeals' decision was within its discretion. The court was exercising the traditional power of appellate courts to withhold issuance of the mandate until assured they have correctly resolved the issues presented. After "hundreds of hours of work" and a review of the "entire certified" record, Judge Suhrheinrich concluded that vital evidence concerning Thompson's mental health at the time of the crime created a factual dispute that precluded the summary dismissal of Thompson's capital habeas claim. All three members of the panel then agreed to vacate the district court's order granting summary judgment, remanding the case to the district court for an evidentiary hearing.

As noted above, petitioner's reliance on the "finality" of the court of appeals' original decision was unreasonable in light of the multiple court-ordered stays of the mandate, the non-issuance of the mandate, petitioner's own unresolved collateral motion, and the court of appeals' recall of the record. But, in any event, the Federal Rules of Appellate Procedure do not require appellate courts to notify the parties as to their decision to withhold issuance of their mandate.

Rather, a directive to the clerk not to issue the mandate suffices. *See, e.g., Sparks*, 604 F.2d at 979. Litigants are rarely aware of *sua sponte* decisions by the courts of appeals *en banc* to reconsider previous panel opinions. There is no reason to impose an impractical notification requirement on *sua sponte* decisions by panels – like this one – electing to modify a decision. Rather, the burden is on a party seeking to execute a judgment to confirm that a mandate has issued. *See, e.g.*, Fed. R. App. P. 41, 1998 adv. com. note ("the parties an easily calculate the anticipated date of issuance and *verify* issuance of the mandate) (emphasis added).

Petitioner's complaint that the court of appeals "never explained"[25] why the mandate was not issued rings similarly hollow. Pet. Br. 23. Petitioner himself did not file a motion for issuance of the mandate during the months following this Court's denial of certiorari or take any other steps, such as contacting the clerk. Moreover, to the extent petitioner found the panel's explanation, *see* Pet. App. 81 n.12, unclear or unconvincing, the better course would have been to seek clarification in the court of appeals by petitioning for rehearing or rehearing *en banc*, and not to mount a categorical attack upon the authority of appellate courts in this Court.[26]

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[25] Petitioner makes a passing suggestion that the court of appeals' decision was contrary to Sixth Circuit Rules, Pet. Br. 22, but that is incorrect. Sixth Circuit Rule 41(c) is, like Fed. R. App. P. 41(d)(2)(D), limited to cases in which a stay has been entered solely for the resolution of a petition for certiorari. In any case, petitioner should have brought that supposed error to the attention of the panel or the *en banc* court.

[26] Petitioner does not even attempt to argue that the underlying merits of the court of appeals' decision remanding the case for an evidentiary hearing was wrongly decided. With good reason. As *amicus curiae* the National Association of Criminal Defense Lawyers explains in its brief, the substance of the court of appeals' decision is absolutely sound. Dr. Sultan's report and deposition plainly demonstrate that Thompson was entitled to an evidentiary hearing. *See* Brief for Amicus Curiae National Association of Criminal Defense Lawyers Supporting Respondent. Petitioner's statement of facts incorrectly states that the court of appeals

3. At the very least, the Court should remand the case to the court of appeals. Indeed, even if this Court concludes that *Calderon* applies, it should remand to the court of appeals for application of that standard. *See Johnson v. California*, 125 S. Ct. 1141, 1152 (2005) (reversing and remanding the case to allow the court of appeals to apply new standard) (citing *Consol. Rail Corp. v. Gotshall*, 512 U.S. 532, 557-58 (1994) (same) and *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1031-32 (1992) (same)). The court of appeals has not had any opportunity to apply that standard, and there are indications that the panel might grant relief even under it, either because a Rule 41(d)(1) stay was in effect, *Calderon*, 523 U.S. at 557, or because a "fraud" was committed upon the court.[27] Given the nature of petitioner's

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"made no finding that Thompson was not at fault in failing to develop mental health evidence in state court or that the limitations set forth in 28 U.S.C. § 2254(e)(2) were satisfied." Pet. Br. 14. Judge Suhreinrich, writing for the court on the ineffective assistance of counsel claim, concluded that, "[i]n light of Dr. Blair's postconviction testimony that a full history was needed to determine whether Thompson was schizophrenic at the time of the offense, the state court postconviction courts' denial of funds amounted to an objectively unreasonable application of *Strickland* under 28 U.S.C. § 2254(d)(1)." Pet. App. 89; *see also id.* at 10-16 (detailing Thompson's efforts to obtain funding for further investigation). Because the court of appeals found that the necessary evidence was unavailable due to the state courts' denial of funds, rather than a lack of diligence by Thompson, the limitations set forth in § 2254(e) are inapplicable. *See Williams*, 529 U.S. at 442-43 (state post-conviction counsel's request for funding to hire an investigator to develop juror bias claim was a "reasonable effort to discover the claims" and "§ 2254(e) will not bar [the prisoner] from developing them in federal court.").

[27] In *Calderon*, this Court exempted from its standard cases involving "fraud upon the court," which "call[] into question the very legitimacy of the judgment." *Calderon*, 523 U.S. at 557; *see Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1278 (11th Cir. 2004), *cert granted* 125 S. Ct. 961 (2005) (*Calderon* recognized a fraud-on-the-court exception to its actual innocence standard). Judge Suhrheinrich concluded that "fraud" had been committed and would have ordered the district court to conduct "full evidentiary hearings" on the issue. Pet. App. 81-115

strategy, and the lack of a developed record on these questions, this Court should not address them in the first instance.

CONCLUSION

The Court should affirm the decision or remand the case for further proceedings in the court of appeals.

Respectfully submitted,

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(Suhrheinrich, J., concurring in part and dissenting in part). Though the other two judges did not make that finding, they conceded the possibility that a fraud had been committed, but opted instead to give habeas counsel's explanation of "mistake" the benefit of the doubt absent a full record. *See id.* at 2-3. It is impossible to know whether the majority would have agreed with Judge Suhreinrich's dissent if forced to confront the possibility of fraud squarely – that is, if the majority could not avail itself of "the principle of Occam's razor," *id.* at 3.

Appendix

Rule 41 of the Federal Rules of Appellate Procedure provides:

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals mu[illegible] issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.